United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1285

To be argued by
DAVID GOTTLIEB

B p/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

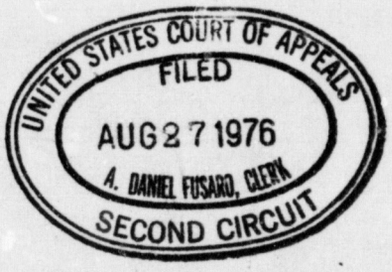
MICHAEL JOURNET

Defendant-Appellant,

Docket No. 76-1285

BRIEF FOR APPELLANT JOURNET

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT MICHAEL JOURNET

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the court failed to comply with Rule 11(c) of the Federal Rules of Criminal Procedure thereby requiring a reversal of the judgment.

STATEMENT PURSUANT TO RULE 28 (a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino), entered June 4, 1976, convicting appellant upon his plea of guilty of intentionally distributing a schedule I narcotic Drug (21 U.S.C. §841(a)(1)) and sentencing him to a term of imprisonment of eight years, with a special parole term of seven years.

This Court assigned the Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

Indictment No. 75 Cr. 849 charged appellant Michael Journet, his two co-defendants Salvatore Russo and "John Doe," and others known and unknown to the Grand Jury with conspiring to distribute narcotics in violation of 21 U.S.C. §841(a)(1).[1] In a second count, the three were charged with distributing one-half ounce of cocaine.

In April 5, 1976, appellant Journet appeared before the Honorable Mark A. Costantino and agreed to withdraw his

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[1]The indictment is set forth as "B" in appellant's separate appendix.

plea of not guilty and plead guilty to count two of the indictment (3).[2]

After informing appellant that he was pleading guilty to what was count two of the indictment and explaining only that the charge was a felony, the court proceeded with an inquiry to determine whether the plea was entered voluntarily. During this inquiry the court informed appellant:[3]

> 1. That he was waiving his right to a jury trial to determine his guilt or innocence (4);
>
> 2. That he was waiving his "right of confrontation of witnesses" (4);
>
> 3. That he was waiving "a right under the law as to the presumption of innocence" (5).

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[2]Numbers in parenthesis refer to pages of the transcript of the plea hearing. The transcript is set forth in full as "C" in appellant's separate appendix.

[3]The colloquy reads as follows:

> THE COURT: Well, in order for the Court to accept a plea of guilty, you must waive certain constitutional rights. And the first of which is the right to a jury trial.
>
> Now, a jury trial, of course, places people in the box there and they hear the case and then they would make a determination as to whether or not you are guilty or innocent after hearing the entire case. Do you waive that right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: The second right is the right of confrontation of witnesses. And that means that the people who know about what they say you have done wrong

(Continued on next page)

However, appellant was not informed during this colloquy that he had the right not to incriminate himself; he was not told that if he pleaded guilty there would be no further trial of any kind, and he was not apprised of the fact that his answers during the plea hearing could be used against him in a prosecution for perjury or making a false statement.

The court secured appellant's concession that the plea was not coerced (6), and that there were no sentence promises other than the Government's agreement to dismiss count one of the indictment (5). Appellant then admitted

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(Footnote continued from last page). . .

> would come to court and testify. And then your lawyer would have a right to cross-examine them to determine whether or not they are being truthful in what they say you have done.
>
> Do you waive that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right, you are pleading guilty to count 2. Now, you can't be guilty and innocent. Therefore, you are waiving a right under the law as to a presumption of innocence. That means that no longer you can be presumed innocent, but you are guilty of count 2 of this indictment; is that right, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You know you are waiving that right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Of being innocent.
>
> THE DEFENDANT: Yes. (4-5)
>
> (Appendix C at 4-5)

that he intentionally distributed a half-ounce of cocaine to one "Jonny Monstache," an act which appellant knew was illegal (7-9).

The court advised appellant that he could receive a maximum sentence of fifteen years imprisonment and a $25,000 fine for the offense. Judge Costantino also informed appellant that he could receive a "minimum of three years special parole term," however, he failed to advise appellant that he could receive a maximum special parole term vastly in excess of three years in addition to any prison term (9-10).

On June 4, 1976, appellant was sentenced to eight years imprisonment, and to a special parole term of seven years. This appeal followed.

ARGUMENT

SINCE APPELLANT'S GUILTY PLEA WAS NOT TAKEN IN COMPLIANCE WITH RULE 11 (c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, THE JUDGMENT MUST BE REVERSED AND THE PLEA VACATED.

Rule 11(c) of the Federal Rules of Criminal Procedure, in effect as of December 1, 1975, provides an explicit and easily followed set of warnings which "the court must give to insure that the defendant who pleads guilty has made an informed plea." Advisory Committee Notes to Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C. at 20 (1975) (emphasis supplied). Since the purpose of the amendments

to Rule 11, like the purpose of the former rule, is to insure on the record that the plea is understanding and voluntary, full adherence to the procedure provided by the Rule is required. McCarthy v. United States, 394 U.S. 459 (1969). The plea proceeding in this case fails to satisfy the requirements of Rule 11. Several of the court's instructions only vaguely resemble the warnings mandated by the Rule; worse still, a number of warnings are entirely omitted. Accordingly, the judgment must be reversed, and the plea vacated. McCarthy v. United States, supra.

The court erred most dramatically by completely failing to warn appellant that by pleading guilty appellant was waiving his right against self-incrimination. This warning is explicitly required by subsection (3) of Rule 11(c), which mandates that a defendant be informed:

> (3) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to cross-examine the witnesses against him, and the right not to be compelled to incriminate himself; . . . (emphasis added)

A review of the history of this subsection demonstrates explicit Congressional intent that a guilty plea not be accepted unless the warnings of Rule 11(c)(3) are given in full. In its proposed amendments to Rule 11, the Advisory Committee suggested the following specification of rights waived by a plea which must be given to a defendant:

(3) That the defendant has the right to plead not guilty or persist in that plea if it has not been made.

(62 F.R.D. 271, 275)

Thus, the rule, as originally proposed, did not require the specific elaboration of a defendant's right not to be compelled to incriminate himself, just as it did not require an explanation of the right to a jury trial or the right to cross-examine the witness against him. The Advisory Committee suggested, rather, that the court "may" explain the three above-mentioned trial rights waived by the defendant, with the exact scope of the warnings required by due process being "left to future case-law development" (62 F.R.D. at 280).[4]

However, this permissive approach was explicitly rejected by Congress which took the unusual step of requiring that the rights to a jury trial and to cross-examine and the right not to incriminate oneself, enunciated in Boykin v. Alabama, 395 U.S. 238 (1969), be codified in Rule 11. H.R. Rep. No. 94-247, 94th Cong., 1st Sess. at 7 (1975).

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[4]Prior to the adoption of these rules, the courts were divided on whether due process (or former Rule 11) required a specific enumeration of the three rights mentioned in Boykin v. Alabama, 395 U.S. 238 (1969). Compare In re Tahl, 460 F. 2d 449 (Cal. 1969), cert. denied, 398 U.S. 911 (1970); Brainard v. State, 222 N.W.2d 711, 717 (Iowa 1974); with Kloner v. United States, Slip. op. at 3661 (2d Cir. May 10,1976) petition for cert. filed Aug. 8,1976; Welking v. Erickson, 505 F.2d 961 (9th Cir. 1974); and Davis v. United States, 470 F.2d 1128 (3d Cir. 1972)

The Congress also made clear that the trial judge "must tell a defendant (these warnings) before a judge can accept a defendant' plea of guilty of nolo contendre." H.R. Rep. No. 94-414, 94th Cong., 1st Sess at 9 (1975). Thus, there is no doubt that the three Boykin warnings are required for a valid guilty plea under the new Rule. Note, Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases, 44 Fordham L. Rev. 1010, 1020 (1976).

Here, the trial court failed to inform appellant he was waiving his right to self-incrimination, stating only that he was waiving his right to confrontation, to a jury trial and to be presumed innocent. Accordingly, for this error alone, the judgment must be reversed.

However, the court's failure to warn appellant of his right not to incriminate himself was only one of several omissions of Rule 11 requirements. Rule 11(c)(3) also requires that a defendant be informed that, in addition to his right to a jury trial, he has the right to the assistance of counsel at that trial. This record is bare of any such warning.

The court also failed to warn appellant that if he pleaded guilty there could be no further trial of any kind. That warning is explicitly required by subsection (c)(4) of Rule 11, which states that a defendant "must" be warned

> (4) That if he pleads guilty or nolo contendre there will not be a further trial of any kind, so that by pleading guilty or nolo contendre he waives his irght to a trial;....

This subsection was added to Rule 11 (c) for the follow-

ing reason:

> Subsection (c)(4) assumes that a defendant's right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers are best explained by indicating that the right to trial is waived. Specifying that there will be no future trial of any kind makes this fact clear to those defendants who, though knowing they have waived trial by jury, are under the mistaken impression that some kind of trial will follow.
>
> Advisory Committee Notes to Rule 11,18 U.S.C.A. at 22 (1975) (Emphasis Supplied)

Having failed to give crucial elements of the warning required by 11(c)(3) and 11(c)(4), the court ther completely omitted any reference whatsoever to the warnings required by 11(c)(5), that if the defendant pleads guilty, he must be warned that the court may ask him questions about the offense, and that "if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement."

In addition to the court's failure properly to warn appellant of the rights he was waiving and the consequences of his admissions, the court failed to warn appellant of the maximum possible penalty provided for his offense. Appellant pleaded guilty to a violation of 21 U.S.C. 841(a) offense with a maximum prison term of 15 years. However, the

offense also includes a special parole term in addition to any prison term. The minimum special parole term is three years; there is no statutory prescribed maximum parole term, but the statute has been interpreted as permitting a special parole term of up to lifetime parole. United States v. Rich, 518 F.2d 980 (8th Cir. 1975); United States v. Sims, 529 F.2d 10 (8th Cir. 1976).

Here, appellant was informed only that in addition to a possible fifteen year prison term, he could receive a minimum of three years special parole; he was never informed that the court could impose a parole sentence well in excess of three years. Appellant may well have been totally suprised then, when the court at sentencing imposed a seven year special parole term.

Rule 11(c)(1) requires the court to inform the defendant, inter alia, of the "mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." That means, quite simply that a defendant know:

> What minimum sentence the judge must impose and the maximum sentence the judge may impose.
>
> Advisory Committee Notes to Rule 11, 18 U.S.C.A. at 21 (1975) (emphasis in original)

Since the appellant was never told that the court could impose up to lifetime parole, the court's advice failed to

comport with the requirements of the rule.[5]

The errors here go well beyond an isolated technical defects or a slip of the tongue. The court's warnings failed to satisfy the requirements of every subsection of Rule 11 applicable to this proceeding -- 11(c)(1), 11(c)(3), 11(c)(4) and 11(c)(5). While reversal is required where the court accepts a guilty plea without "fully adhering to the procedure provided for in Rule 11" (McCarthy v. United States, supra, 349 U.S. at 463-464), even under a more lenient standard, such as "substantial compliance," reversal would be required.

Finally, we note that in addition to being mandated, compliance with Rule 11 is easily accomplished. Unlike the prior rule, the boundaries of which were more uncertain, and varied from case to case (Kloner v. United States, supra), the present 11(c) warnings are precise and obvious. The district court need only have a copy of the rule in front

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[5]In Michael v. United States, 507 F.2d 461 (2d Cir. 1974), this court seemingly approved an instruction on special parole such as the one given here. However, that case was decided under former Rule 11, which provided only that the defendant be informed of the "consequences" of the plea, rather than the more specific requirements of present Rule 11. Michael cannot be read as approving such instructions under the present rule. Simply, a defendant informed only that he can receive a minimum three year special parole term had not been informed of the maximum possible sentence for his offense.

of it when it questions a defendant.[6] That undoubtedly did not occur here, and the result must therefore be a reversal of judgment.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT BELOW MUST BE REVERSED.

Respectfully submitted,

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[6]Nor are the rules so new that knowledge of their requirements could not be expected. As Congressman Wiggins noted:

> The conferees agreed that the proposed amendments of the judicial conference as amended by H.R. 6799 should not take effect until December 1,1975 so that all of the United States Attorneys, the United States judges and the practicing bar will have ample notice that Congress has amended the proposals of the judicial conference and adequate opportunity to study both the proposals and amendments.
>
> Cong. Rec. 7863 (July 30, 1975)

CERTIFICATE OF SERVICE

Aug 27, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Ralph Sklarsky